IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1181 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DHANJIBHAI PETHABHAI

Versus

STATE OF GUJARAT

Appearance:
MR YOGESH S LAKHANI for Petitioner
MR KP RAVAL,APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE J.R.VORA

Date of decision: 12/09/2000

ORAL JUDGEMENT (Per: K.R.Vyas,J.)

1. While considering the request for bail, we heard

the matter at length and after hearing, we found that the only question which is required to be decided is about the truthfulness of the dying declaration. We have, therefore, decided to hear the appeal finally. The learned Counsel appearing for the parties have stated before us that they will have no objection if the appeal is heard finally instead of deciding the question of bail. This is particularly in view of the fact that the paper book is ready and there will not be any difficulty in taking up the matter for final hearing.

2. The appellant- accused who is convicted by the learned City Sessions Judge for an offence punishable under section 302 of the IPC in Sessions Case No. 248 of 1995 and is sentenced to suffer R.I. for life and to pay a fine of Rs. 2000/-, in default, to undergo S.I. for three months, has challenged the said judgment and order dated 30.9.1999 by way of this appeal.

3. The accused who is the husband of deceased Gita was charged along with other accused, namely his father, mother and two brothers for an offence punishable under section 498-A of the IPC for subjecting cruelty to deceased Gita. The appellant was also charged for an offence punishable under section 302 of the IPC for committing murder of his wife by pouring kerosene and setting her to fire. At the end of the trial, the learned trial judge was pleased to acquit the original accused nos. 2 to 5 of the charges levelled against them and convicted accused no.1 for an offence punishable under section 302 of IPC.The incident in question had taken place at about 9.30 a.m. on 24.4.1995 in the house of the appellant situated opposite Naroda Railway Station in the City of Ahmedabad. From the record, it is not clear as to who brought the injured Gita to Civil Hospital and what treatment was given to her. From the evidence of PSI Natvarlal Oza, PW 3 Ex.14, it appears that he was performing his duty as PSI in Sardarnagar Police Station on the day in question between 14.00 hours and 20.00 hours. After receiving instructions from the PSO, necessary entry being Entry No. 10 of 1995 was made by him. He had gone to the place of the incident for the purpose of preparing panchanama Ex. 15. Unfortunately, Entry No. 10 of 1995 is also not produced by the Investigating Officer. However,in the evidence of PSI Oza, he has stated that information conveyed to the police station was to the effect that Gita Dhanji had sustained burn injuries by the burning stove. In substance, it appears that initially the offence of accident was registered with Sardarnagar Police Station. Even though Gita was alive, no efforts were made by the

Investigating Officer to record her complaint. It appears that vide Ex. 12, Head Constable Abhaysinh of Sardarnagar Police Station, sent a yadi to Jagdish Sunderlal Parmar, PW 2 Ex. 11, Executive Magistrate requesting him to record the dying declaration of Gita. Ex. 12 also reveals the fact that Gita, while preparing food on stove had sustained burn injuries and for that purpose, the dying declaration was required to be recorded. The Executive Magistrate received the said yadi at 8.25 p.m. at his residence. Thus, when yadi Ex. 12 was sent to the Executive Magistrate by Head Constable Abhaysinh of Sardarnagar Police Station, the case was registered as a case of accidental burns. Unfortunately, the Head Constable Abhaysinh has not been examined by the prosecution. Therefore, it is also not clear as to how Sardarnagar Police Station received the said information and who conveyed the information regarding burn injuries sustained by Gita. Even though injured Gita was lying in the Civil Hospital with serious injuries since 9.30 a.m., no efforts were made by the Investigating Officer to know the true facts from her. It appears to us that the investigation was put into motion at the instance of Assistant Police Commissioner Brahmbhatt. This is clear from the evidence of Jayantilal J.Mevada, PW 4 Ex. 20 who at the relevant time was serving as Police Inspector at Sardarnagar Police Station. In his evidence,he has stated that he was called by the Assistant Police Commissioner Shri Brahmbhatt to the Civil Hospital by sending Wardi. Unfortunately, neither the Assistant Police Commissioner Shri Brahmbhatt is examined by the prosecution nor the Wardi, if any, is produced by the prosecution. However, as per the evidence of Police Inspector Shri Mevada, he reached the Civil Hospital thereafter; recorded the complaint of Gita at 9.00 o'clock night and thereafter started investigation. Executive Magistrate, after receiving the Wardi Ex. 12, reached Civil Hospital and recorded dying declaration of Gita,at Ex.13. The learned trial judge, on the basis of the complaint Ex. 21 recorded by Police Inspector Shri Mevada and the dying declaration Ex. 13 recorded by the Executive Magistrate Shri Parmar, by accepting the complaint Ex. 21 and the dying declaration Ex. 13 to be true and believable, convicted and sentenced the present appellant. In our opinion, the manner in which the complaint Ex. 21 and dying declaration Ex. 13 were recorded raises a doubt regarding their genuineness and truthfulness. As stated above, no efforts have been made by the officers of Sardarnagar Police Station to record the statement of the deceased right from the time when she was admitted in the hospital in the morning till 9.00 p.m. i.e. for about 12 hours. No Yadis have been

produced before the Court to show as to who conveyed the information to Sardarnagar Police Station. Similarly, there is nothing on record to show as to who had treated injured Gita and what treatment was given to her and what was her condition. Unfortunately, the prosecution has not examined any doctor who had given treatment to deceased Gita. Ex. 12 which is a Wardi sent to Executive Magistrate for recording dying declaration, somebody has made an endorsement to the effect that the "patient is conscious--7.45 p.m.--24.4.1995". It is not made clear as to who had made the endorsement on Wardi Ex. 12. Therefore, in absence of the above particulars which, in our opinion, are quite material, it is simply hazardous to rely upon the complaint as well as dying declaration on their face value. As per the evidence of Dr. Ganesh Govekar, PW 6 Ex. 24 who performed post-mortem, deceased Gita had sustained burn injuries on her entire body except head and sole of the legs. All the vital parts of the body were congested. Even Police Inspector Shri Mevada, in his evidence, has admitted that the deceased Gita had sustained serious burn injuries and there was swelling on her face. He has further admitted that she used to become unconscious frequently after she was admitted in the hospital. It is not in dispute that Gita succumbed to injuries on 24.4.1995 at 10.40 p.m. Thus, she could not survive long after her complaint as well as dying declaration were recorded. Therefore,the question that arises for our consideration is whether she was in a position to make a statement before police as well as before the Executive Magistrate at about 9.00 p.m. on the day in question. In spite of her serious condition, Police Inspector Mevada did not think it necessary to obtain endorsement from the doctor on duty regarding her condition. He, in his evidence, has stated that the deceased was primarily fit to give the statement. Similarly, Executive Magistrate Parmar, in his evidence, has stated that he was conveyed information by the doctor on duty that the patient was conscious and thereafter he started recording dying declaration. In our opinion, this is not the way to record the statement of the injured who is struggling for life.

4. The Supreme Court, in the case of Maniram Vs. State of M.P., AIR 1994 SC 840 has laid down that " when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. These are some of the important requirements which have to be observed." Since there is

no endorsement by the doctor when the complaint as well as the dying declaration were recorded regarding the condition of the deceased, in our opinion, the complaint as well as the dying declaration cannot be said to be reliable and trustworthy and they are required to be ignored. In the complaint, no timings are stated and, therefore, doubt arises as to the time of recording complaint as stated by Police Inspector Mevada. The long narration of facts in the complaint including the explanation given by her about the first information conveyed by her also raises doubt about the genuineness of the complaint. As stated above, there is nothing on record as to who gave the first information and to whom. In any case, there is nothing on record which may go to suggest that deceased Gita, in fact, gave the statement to the police. It appears to us that a deliberate attempt is made to explain about the accident having taken place whereby the deceased sustained burn injuries. In any case, the question still arises as to whether the deceased was in a position to give such an elaborate statement by way of complaint. If at all the Police Inspector Mevada recorded the complaint Ex. 21, his presence ought to have been noticed by the Executive Magistrate Parmar who has also recorded dying declaration at the same time. Unfortunately, he has not stated a word about the presence of PI Mevada. The dying declaration Ex.12 recorded by the Executive Magistrate Parmar in absence of any endorsement by the concerned doctor regarding the condition of deceased Gita, in our opinion, does not inspire confidence and no conviction can be based relying on such dying declaration. Various doubts which we have raised have remained unanswered and, therefore, on the basis of suspicion, no conviction can be based. In our opinion, the learned trial judge, by placing reliance on such documents, has clearly misdirected himself in passing the order of conviction resulting into miscarriage of justice. Unfortunately, the father of the deceased Gita, Dungarbhai, PW 1 Ex.10 has turned hostile and, therefore, the evidence regarding cruelty alleged to have been caused by the accused have not come on record. Thus, the so-called allegations made in the complaint as well as dying declaration of the deceased do not get any corroboration from any other evidence. In this state of affairs, in our opinion, the learned judge has, in fact, committed an error in convicting the appellant for an offence punishable under section 302 of IPC which, in our opinion, can not stand at all.

5. In the result, we allow this appeal and set aside the judgment and order of conviction and sentence dated

30th September 1999 passed in Sessions Case No.248 of 1995 by the learned City Sessions Judge, Ahmedabad and acquit the appellant and direct that the appellant be set at liberty forthwith if not required in any other case.

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